SOUTH AFRICA / JUDGMENT

Pather v S (1490/24P) [2024] ZAKZPHC 30 (28 March 2024)

[2024] ZAKZPHC 30

COURT
Kwazulu-Natal High Court, Pietermaritzburg

BEFORE
Veerasamy

CASE / FILE NUMBER
1490/24P

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IN THE HIGH COURT OF
SOUTH AFRICA
KWAZULU-NATAL
DIVISION, PIETERMARITZBURG
CASE NO: 1490/24P
In

the matter between:

ALVIN
PATHER
Applicant
and
THE
STATE
Respondent
ORDER
The

following order is granted:

a)
The applicant's application for a postponement is refused.
b)
The application is dismissed;
c)
Each party shall bear their own costs.

JUDGMENT

Veerasamy AJ

Introduction

[1] The applicant seeks an order extending the bail granted to him in terms of two orders of this court dated 28 June 2023 and 2 February

2024. He intends for such extension to endure until he has finalised his appeal against an order handed down by the regional court on 27 February 2024 refusing his most recent bail application before that court.

[2] During the proceedings of 27 March 2024, the applicant's attorney's instructed Mr Osborne who appeared for the applicant to seek a postponement of the proceedings. I was advised that in light of the questions posed by the Court during the applicant's address, the applicant has come to the conclusion that he needed to amend his notice of motion to seek different relief and would need to deliver a supplementary affidavit. He essentially wanted to started the proceedings de novo.

[3] Mr Truter who appeared for the respondent opposed the application for a postponement.

[4] Mr Osborne advised me that the applicant would still seek an extension the bail granted to him in terms of the order of 28 June 2023 so as to now continue to prosecute the revised application (should the postponement be granted). He would seek such an order under the umbrella of section 173 of the Constitution, being the basis upon which relief in the application is currently sought.

[5] I intend to deal with the application for postponement at the end of this judgment as it appears that the success of such application is tied to the merits of the application in its current form.

[6] A brief description of the events leading to the order of 28 June 2023 is necessary.

[7] On 4 October 2018, the applicant was convicted in the regional court, sitting as a specialised commercial crime court of 16 counts of fraud.[1]

[8] On 25 November 2022, on appeal to the high court, the appeal on sentence was upheld, and a new sentence was imposed for an effective term of eight (8) years of imprisonment.[2]

[9] The applicant's petition to the Supreme Court of Appeal failed and he subsequently sought leave from the Constitutional Court to appeal the sentence of the high court. This further application for leave to appeal was refused on 31 January 2024.

[10] Whilst awaiting the outcome of his leave to appeal application before the Constitutional Court, the applicant, who at this stage would have foreseen the likely outcome of his petition, instituted an application to review the regional magistrate's decision on his conviction and sentence. Such review application, I am advised, is still pending.[3]

[11] On 2 February 2024, the applicant instituted proceedings before this court and, by consent with the respondent, obtained an order directing him to institute a new bail application in the regional court.

[12] On 29 February 2024, the application for bail before the regional magistrate in the regional court was refused.[4]

[13] An appeal against the refusal of the bail was lodged on 4 March 2024. This application for bail has not been heard.

[14] What the applicant seeks from this court is an extension of the bail, which he was granted in terms of the orders dated 28 June 2023 and 2 February 2024.

The court order of 28 June 2023

[15] The order of 28 June 2023 was granted by consent between the parties. There were 13 conditions attached to the bail which was granted in respect of the order. I deal only with those conditions which have a bearing on these proceedings. These conditions read as follows:

'9. THAT the Applicant shall lodge his application to the CC by no later than 5 July 2023 with the Registrar of the CC and also lodge a copy thereof with the Registrar of the High Court, Pietermaritzburg and one with the Director of Public Prosecutions, Pietermaritzburg.

10. THAT, in the event of the Applicant failing to lodge his application to the CC by 5 July 2023 as stated above, or the application to the CC being dismissed, whether wholly or in part, or withdrawn, or abandoned or struck from the roll or otherwise finally disposed of with the result that the Applicant has to –

10.1 Surrender himself to the Registrar of this Court, between 08h30 and 13h00, within 3 (three) court days following on the day on which the said order was served on him/her, in order to give effect to the sentence(s) imposed, which the order the Applicant shall comply with.

11. THAT, in the event of the Constitutional Court application being successful and leave to appeal is granted to the Applicant (hereafter referred to as the Appellant) the bail as stated above will be extended on same terms and conditions pending the outcome of the appeal.

. . .

13. THAT, in the event of the appeal being finalised by being dismissed, whether wholly or in part, withdrawn, abandoned or struck from the roll, or otherwise finally disposed of, with the result that the Appellant has to:

13.1 Surrender him/herself to the Registrar of this court, between 08h30 and 13h00, within 3 (three) court days following on the day on which the said order was served on him/her, in order to give effect to the sentence(s) imposed, which the order the Applicant shall comply with.'

The order of 2 February 2024

[16] The order of 2 February 2024 consists of four paragraphs and reads as follows:

'1. It is directed that a new bail application must be brought in respect of the pending review application in AR392/2023.

2. The issue of bail is referred to the Regional Court and the applicant is warned to appear in the Specialised Commercial Crime Court-T Durban at 10:30 on 6 February 2024.

3. The applicant's bail, granted in Case No. AR336/2021 is extended on the following conditions:

3.1 The Regional Court Magistrate hear the bail application to determine whether the applicant ought to be released on bail pending the finalisation of his review application.

3.2 The bail application must be concluded by no later than 23rd of February 2024 unless otherwise directed by the Regional Court Magistrate.

4. The order under appeal No. AR336/2021 is stayed pending the finalisation of paragraph 3 herein.'

The parties submissions

[17] The applicant submits that in terms of section 173 of the Constitution the high court has an inherent power to protect and regulate its own process and develop the common law taking into account the interests of justice. He concedes that the relief which he seeks falls outside the parameters of the Criminal Procedure Act 55 of 1977 and that he seeks an extension of bail pending a bail appeal, which is yet to be heard.

[18] The applicant submits that the order granted on 2 February 2024 permits him to remain on bail pending the finalisation of the bail proceedings. Thus, considering that there is a bail appeal pending, such proceedings have not yet been finalised.

[19] The respondent conversely argues that the order which the applicant seeks in these proceedings is in law impermissible and unsustainable. The respondent submits that the relief which the applicant seeks is not countenanced by the Criminal Procedure Act and that his recourse lies in section 65 of the Criminal Procedure Act, which he has not invoked. Therefore, respondent submits, that this court has no jurisdiction to grant the relief which the applicant seeks.

[20] In amplification thereof the respondent submits that the nature of the relief which the applicant seeks is an impermissible variation of the order under case no. 1490/24P.

The extension of bail

[21] The relief which the applicant seeks is foreshadowed in paragraph 2 of his notice of motion and reads as follows:

'That the applicant's bail granted on 8 December 2022 and extended on 2 February 2024 be further extended until finalisation of the court order refusing bail dated 27 February 2024.'

[22] The date in of '8 December 2022' in the paragraph two of the notice of motion should read 28 June

2023. The notice of motion was amended by consent between the parties at the outset of the hearing so as to reflect the correct date. The enquiry which must be engaged in is whether either of the orders under scrutiny permit an extension of the bail granted in terms of these orders.

[23] The Supreme Court of Appeal in Firestone South Africa v Gentiruco[5] held the following with regard to how one approaches the principles regarding interpreting a court order:

'the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules . . . Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.'[6]

[24] One must start by determining the manifest purpose of the order under consideration.[7]

[25] The order of 28 June 2023 limited the lifespan of the applicant's bail to the applicant's application for leave to appeal before the Constitutional Court. The order set out the consequences which would arise if application for leave to appeal was successful or unsuccessful.

[26] The applicant conceded this much during the hearing and accepted that once he had delivered his review application in November 2023, he should have approached this court to revisit the order of 28 June 2023. Whilst I doubt, he would have been able to revisit the order without the buy-in of the respondent (since it was a consent order), what his concession demonstrates is an acknowledgment that the order of 28 June 2023 was limited to the lifespan of his leave to appeal before the Constitutional Court.

[27] Paragraph 10.1 of the 28 June 2023 order provided that where such application for leave to appeal was unsuccessful then the applicant was to surrender himself within three court days 'in order to give effect to the sentence(s) imposed, which order the applicant shall comply with'.[8]

[28] The 28 June 2023 order always intended for the applicant to serve out the sentence of imprisonment if he was unsuccessful before the Constitutional Court. This is clearly evident from paragraph 13.1 of the order[9] which requires the applicant to surrender himself within three days in the event that such appeal had been dismissed (provided that the leave to appeal was granted).

[29] It is common cause between the parties that the applicant's application for leave to appeal to the Constitutional Court was finalised on 31 January 2024 with such application being refused. Paragraph 10.1 of the order of 28 June 2023 is prescriptive, and the applicant was required to surrender himself by no later than 3 February 2024 in order to give effect to the sentence imposed upon him. The applicant has failed to surrender himself, and effectively at present appears to be in contempt of such court order.

[30] The applicant has not brought an application to vary paragraph 10.1 of the 28 June 2023 order and from the facts presented in this application, there appears to be no basis upon which such variation would be available to him under Uniform rule 42.

[31] An extension of the bail granted in terms of the 28 June 2023 order would ignore the further terms of the order which direct the applicant to surrender himself and commence serving his sentence of imprisonment (by no later than 3 February 2024). The extension of bail sought by the applicant would result in two conflicting orders being in place.

[32] Absent the further terms of the order of 28 June 2023 being varied, the relief for an extension of the bail is unavailable to the applicant. During the hearing Mr Osborne correctly accepted that the order of 28 June 2023 demanded that the applicant commence serving his sentence of imprisonment and that the relief which is sought in the notice of motion was contradictory to paragraph 10.1 of the order of 28 June 2023.

[33] The applicant contends in his application that an extension of the bail granted to him in the 28 June 2023 order is always available to him and this was acknowledged by the court which granted the order of 2 February 2024. During the hearing Mr Osborne correctly accepted that paragraph 4 order of 2 February 2024 was limited in its application in that it only stayed the order of 28 June 2023 until the bail application before the magistrate had been decided by the magistrate.

[34] Once the magistrate made took a decision on 29 February 2024 to refuse the applicants application for bail then the order of 2 February 2024 ceased to have any application and the applicant was obliged to surrender himself to carry out his sentence of imprisonment. I deal with same in greater detail in this judgment.

[35] Notably, the order of 2 February 2024 was an order by consent. Hence, the court did not make a pronouncement on whether it could or would extend the applicant's bail since the parties had agreed to the relief in the limited terms as set out in the order of 2 February 2024.

[36] The applicant's suggestions in his affidavit and heads of argument that the court hearing the application on 2 February 2024 found substance in his argument (for the extension of bail) is not supported by the fact that such order was one taken by consent.

[37] Before me there is no such consent between the parties for the extension of bail. As such, I must consider the order of 2 February 2024 in accordance with its written terms. Much like the order of 28 June 2023, the 2 February 2024 order is limited in its application. This is expressed in paragraph 4 of the order which reads as follows:

'The order under appeal No. AR336/2021 is stayed pending the finalisation of the order in paragraph (3) herein.'

[38] Paragraph 3 of the order, dated 2 February 2024, reads as follows:

'The Applicant's bail granted in Case No. AR336/2021, is extended on the following conditions:

3.1 The Regional Court Magistrate shall hear the bail application to determine whether the applicant ought to be released on bail pending the finalisation of his review application.

3.2 The bail application must be concluded by no later than 23rd of February 2024 unless otherwise ordered by the Regional Court Magistrate.'

[39] The proceedings to which paragraph 3 of the order of 2 February 2024 relates is the new bail application that came before the regional

magistrate and was refused on 29 February 2024. Paragraph 3 does not relate to any appeal of such refusal of bail. It is common cause between the parties that those magistrate bail proceedings were finalised on 29 February 2024.[10]

[40] Thus, when the regional magistrate refused the applicant's application for bail, the order of 2 February 2024 ceased operate. Once again, the applicant has not sought to vary the terms of such order nor are there any facts before me which would appear to justify such application having been brought.

[41] It is clear that the orders of 28 June 2023 and 2 February 2024 sought to bring finality to the various appeal processes which the applicant had invoked. The orders sought to avoid an untenable situation arising where the bail granted to the applicant would endure for an indeterminate amount of time.[11]

[42] In respect of the pending bail appeal and a review application, the applicant makes out no case as to whether he enjoys any success in those proceedings. Such would have been important facts to be considered in the event that the applicant wanted to lean on those proceedings in order justify the relief being sought.

[43] In S v Nel[12] the court held the following:

'I persist in the view that finality is a very important consideration in a matter such as the present where the Supreme Court of Appeal has had occasion to deliberate on and determine both the merits and sentence of the applicant's appeal. It is not in the interest of justice, that a duly convicted person should delay or postpone serving his or her sentence by seeking to be released on bail without any reasonable prospect of an appellate Court altering such conviction or sentence.'[13]

[44] In Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism[14] the Constitutional Court held that 'a court needs to ensure that the possibility of duplicate or contradictory relief is avoided.'[15]

[45] If the order as prayed for by the applicant is granted it would indeed result in contradictory relief. The relief, if granted, would contradict the orders of 28 June 2023 and 2 February 2024 in that:

(a) Paragraph 10.1 of the 28 June 2023 order expressly demands that the applicant surrender himself within three days of his Constitutional Court application failing; and

(b) Paragraphs 3 and 4 of the 2 February 2024 order intended to extend the applicant's bail until the date on which the applicant's bail application before the regional court had been heard.

(c) The 28 June 2023 order does not envisage the applicant having bail beyond 31 January 2024 being the date on which the Constitutional Court refused his appeal application; and

(d) The order of 2 February 2024 does not envisage the applicant's bail being extended beyond 29 February 2024 being the date on which the regional court heard the bail application.

[46] The applicant contends that this court has inherent jurisdiction to grant the order which he seeks. However, the applicant misconceives the circumstances under which an application of inherent jurisdiction might be applied. The inherent jurisdiction of the high court can only be applied to address a lacuna which, in the absence of judicial intervention, would result in injustice.[16] During the hearing I enquired from applicant as to whether there was any authority which would support his argument. The applicant did not have such authority. Rather, I was advised that I need look no further than the wording of section 173 and that the interests of justice demanded that an order extending bail be granted.

[47] The applicant suggested that the case of Bailey and Others v S[17], which was authority which the respondent had referred to, demonstrated how Section 173 could be invoked by me. However, upon further interrogation of the case, the applicant accepted that the case addressed the issue of the High Court's jurisdiction to grant bail. He further accepted that this was not the relief that he was seeking from me, rather what he sought as relief in these proceedings was to extend the application of the 28 June 2023 order. Thus, Bailey and Others v S was distinguishable from the application before me.

[48] In Phillips and Another v National Director of Public Prosecutions[18], the Constitutional Court held as follows:

'[47] The Constitution requires that judicial authority must vest in the courts which must be independent and subject only to the Constitution and the law. Therefore courts derive their power from the Constitution itself. They do not enjoy original jurisdiction conferred by a source other than the Constitution. Moreover, in procedural matters, section 171 makes plain that "[a]ll courts function in terms of national legislation and their rules and procedures must be provided for in national legislation." On the other hand section 173 of the Constitution preserves the inherent power of the courts to protect and regulate their own process in the

interests of justice. In S v Pennington and Another, this Court held that:

> *"It is a power which has to be exercised with caution. It is not necessary to decide whether it is subject to the same constraints as the 'inherent reservoir of power to regulate its procedures in the interests of the proper administration of justice' which vested in the Appellate Division prior to the passing of the 1996 Constitution. Even if it is subject to such constraints, the present situation, in which there is a vacuum because the legislation and rules contemplated by the Constitution have not been passed, is an extraordinary one in which it would be appropriate to exercise the power."*

[48] In Parbhoo and Others v Getz NO and Another too, this Court turned to its "inherent power" to meet an "extraordinary" procedural situation pending enactment of relevant legislation and promulgation of rules of procedure. In both cases the points are made that ordinarily the power in section 173 to protect and regulate relates to the process of court and arises when there is a legislative lacuna in the process. The power must be exercised sparingly having taken into account interests of justice in a manner consistent with the Constitution.

[49] It may be that the High Court could legitimately claim inherent power of holding the scales of justice where no specific law directly provides for a given situation or where there is a need to supplement an otherwise limited statutory procedure such as the one in section 26 of the Act. This can wait for a decision in the future when such a case presents itself.

[50] In the present matter the applicants made no attempt whatsoever to bring their case within the provisions of the Act, which they could have done. The effect of the High Court order rescinding the restraint order was to ignore the statutory provisions of an Act of Parliament.

[51] Whatever the true meaning and ambit of section 173, I do not think that an Act of Parliament can simply be ignored and reliance placed directly on a provision in the Constitution, nor is it permissible to side-step an Act of Parliament by resorting to the common law.'[19] (footnotes omitted)

[49] The respondent directed my attention to the authority of Molaudzi v S[20] where the Constitutional Court held:

'[34] The power in section 173 must be used sparingly otherwise there would be legal uncertainty and potential chaos. In addition, a court cannot use this power to assume jurisdiction that it does not otherwise have.'

[50] The Constitutional Court in Molaudzi[21] also held the following in respect of finality of judgments in criminal matters:

[19] However, the general principle of res judicata in the criminal context is that once an application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative. It is somewhat different from civil cases where a defendant may raise a plea of res judicata only where the same litigant seeks the same relief on the same cause of action. Thus it appears that in the criminal context, the "cause of action" is more aptly regarded as the conviction or sentence as a whole. An accused who has been convicted and sentenced, generally may not appeal against the decision more than once – despite changing the grounds for appeal. The minority judgment of Van der Westhuizen J in Mpofu confirmed the need for finality in criminal matters:

"The fact that an application for leave to appeal or an appeal is without merit, or 'ill advised', cannot easily make it a nullity and open the way for further appeals, every time on a different ground."

[20] This accords with the public policy considerations underpinning criminal res judicata: to bring about finality to a conviction. If a convicted person was allowed to launch successive appeal proceedings on different grounds, this would undermine legal certainty and inundate courts with frivolous litigation.

[51] In these proceedings, the applicant is not without remedy. His remedy is to persist with his bail appeal which he has already instituted. Should he wish to stay the effect of the order compelling his imprisonment then that application needs to be brought separately.

[52] In this regard the respondent argues that section 307 of the Criminal Procedure Act 51 of 1977 does not suspend the applicants sentence pending his review since his application for bail was refused by the magistrate on 29 February 2024. The applicant's recourse is to appeal such refusal of bail, which he has done. The respondent submits that this Court does not have jurisdiction to grant the applicant his relief.

[53] I am not in agreement with the respondent's argument on the absence of jurisdiction since the relief which is being sought by the applicant (by his own argument) is not for bail but rather the extension of the order would grant him bail. Further the case of Bailey and Others v S (AR371/13) [2013] ZAKZPHC 72 (28 November 2013) which respondent has relied on seems to indicate that this Court may grant bail if same is directly sought under section 173 of the Constitution.

[54] The application for an extension of the bail granted in terms of the orders of 28 June 2023 and 2 February 2024 would result in conflicting orders. Those orders limited the lifespan of the applicant's bail to the proceedings before the Constitutional Court and the magistrate court (respectively). Once those proceedings finalised the application was directed by paragraph 10.1 of the 28 June 2023 order, to surrender himself to serve out his imprisonment This much is conceded by the applicant.

[55] There is no lacuna in our law which the application seeks to address. Accordingly, the applicant has failed to establish a basis for the relief which he seeks in his notice of motion and the application must fail.

[56] The applicant fully alive to this, made his application for a postponement whist simultaneously seeking an order extending the order of 28 June 2023 so that he could prosecute his revised version of this application.

[57] The principles of an application for postponement as follows:[22]

(a) The court has a discretion as to whether an application for postponement should be granted or refused.

(b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon wrong principles, but for substantial reasons.

(c) The Court must reach a decision after properly directing his/her attention to all relevant facts and principles;

(d) An application for postponement must be made timeously, as seen as the circumstances which might justify an application become known to the applicant but where fundamental fairness and justice justify a postponement the court may in appropriate cases allow such an application for postponement, even though the application was not timeously made.

(e) The application for postponement must always be bona fide and not used simply as a tactical manoeuvre, for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

(f) Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised. What the court has primarily to consider is whether any prejudice caused by a postponement by an appropriate order of costs or any other ancillary mechanisms.

(g) The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement in such an application if the postponement is granted against the prejudice which will be caused to the applicant if it is not.

(h) Where the applicant for a postponement has not made the application timeously, or otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its discretion might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action defences in the action.

(i) The factors to be considered are the broader public interest; the prospects of success on the merits the reason for the lateness; the conduct of counsel; the costs involved in the postponement; the potential prejudice to the other interested parties; the consequences of not granting a postponement; and the scope of the issues that ultimately must be decided.

[58] The application for a postponement was made midway the proceedings when the applicant foresaw the difficulties with the relief he was seeking. He now intends to start the process de novo by amending the founding documents to his application. The application was not made timeously. The applicant should have alive to the difficulties he was confronted with when h commenced preparation for the hearing.

[59] It is not in the interest of justice to postpone these proceedings for the only purpose of affording the applicant the luxury of using his existing case number, since the case which the respondent will have to meet on the revised application will, from the impression created by the application for a postponement, be materially different the case before me now. There must be some finality in these proceedings especially in light of the order directing the application to surrender himself and commence serving his sentence of imprisonment.

[60] The applicant has not demonstrated any basis upon which it is in the interest of justice that this matter be adjourned. For the reasons already stated there is also no legal basis for extending the orders of 28 June 2023 and 2 February 2024.

[61] I am advised by both parties that neither seeks a costs order against the other.

Order

[62] I therefore make the following order:

I VEERASAMY AJ

CASE INFORMATION

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[1] The record at 14, para 9 of the founding affidavit.

[2] The record at 14, para 11 of the founding affidavit.

[3] The record at 15, para 16 of the founding affidavit.

[4] The record at 16, para 24 of the founding affidavit.

[5] Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) (Firestone).

[6] Firestone at 304E-F.

[7] Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd and others

[2012] ZASCA 49; 2013 (2) SA 204 (SCA) para 13.

[8] The record at 47, para 10.1 order dated 28 June 2023.

[9] The record at 49.

[10] The record at 16, para 24 of the founding affidavit.

[11] Basadi Baitsosa Consultants and Projects CC v South African Forestry Company Soc Ltd 2021 JDR 1297 (GP) para 5.3.

[12] S v Nel 2002 (1) SACR 425 (T).

[13] S v Nel at 429h-j.

[14] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others

[2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (Bato Star Fishing).

[15] Bato Star Fishing para 17.

[16] Standard Bank of South Africa Ltd and others v Mpongo and others 2021

(6) SA 403 para 53.

[17] Bailey and Others v S (AR371/13) [2013] ZAKZPHC 72 (28 November 2013)

[18] Phillips and others v National Director of Public Prosecutions

[2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) (Philips).

[19] Phillips paras 47-51.

[20] Molaudzi v S 2015

(8) BCLR 904 (CC)

[21] Molaudzi paras 19 - 20

[22] Tuhf Limited v 266 Bree Street Johannesburg (Pty) Ltd and Others (11987/2020) [2023] ZAGPJHC 128 (14 February 2023), para 6 - 8

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